

June 10, 2011

The Honorable Kathleen Sebelius
Department of Health and Human Services
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Washington, DC 20201



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Dear Secretary Sebelius:

On behalf of our consumer constituents in Kentucky, the Kentucky Equal Justice Center submits these comments to oppose the application of the Kentucky Insurance Commissioner for an adjustment to the 80% minimum medical loss ratio in the non-group market required under section 2718 of the Public Health Services Act. Kentucky has failed to demonstrate that a medical loss ratio of 80% would destabilize the market, by either causing insurers to exit, causing covered enrollees to lose their insurers, or reducing access to agents and brokers. Further, there is alternative coverage in the market and the negative impact to consumers would be substantial if the waiver is granted. Therefore, we respectfully request that this application be denied.

The Kentucky Equal Justice Center is a civil legal services organization that works closely with legal aid organizations across Kentucky. Our advocates assist health care consumers on issues regarding enrollment, coverage, cost and continuity of care. In collaboration with other consumer groups in the state, we work to protect the rights of our constituents to high-quality, affordable health care.

The medical loss ratio (MLR) gives consumers a straightforward calculation of how their premium dollars are spent and sets a minimum level of spending on medical benefits and quality improvement at 80% in the individual and small group markets. Congress, with the support of the Congressional Budget Office, concluded that an 80% minimum MLR in the non-group market was attainable by efficiently operated insurers.

Adjustments to the MLR may be granted only if “the Secretary determines that the application of such 80% may destabilize the individual market” in a state.¹ HHS regulations implementing this provision of the law provide that the Secretary may adjust the MLR standard in a state only “if there is a reasonable likelihood that application of the requirement will do so.”²

Kentucky seeks to reduce the minimum medical loss ratio to 65% for calendar year 2011, 70% for 2012, and 75% for 2013. However, Kentucky has failed to make the case that its individual insurance market will be destabilized if HHS fails to grant the adjustment it

¹ PHSA § 2718(b)(1)(A)(ii).

² 42 C.F.R. § 158.301.

requests. Kentucky has failed to supply much of the information that HHS has requested to justify its request, citing confidentiality concerns. Yet much of this information is available publicly through NAIC filings and has been supplied by other states that have requested adjustment requests. The information Kentucky has provided does not make the case that an adjustment is necessary under the standards set out in the HHS medical loss ratio interim final regulations.

Indeed, it appears that Kentucky's request is largely based on a fear that Kentucky's experience in introducing reforms in the individual and small group market in the mid-1990s will be repeated again with the introduction of minimum MLR requirements. Although the Kentucky market was indeed destabilized by the 1990s reforms, those reforms involved guaranteed issue, modified community rating, new mandates, and new rate review authority—in sum, they were very different than the MLR requirement. We share the perspective articulated by Kentucky Voices for Health that implementation of the ACA is distinguishable from Kentucky's previous experience with health care reform. There is no logical reason why introduction of a minimum MLR requirement would result in similar destabilization.

Additionally, although Kentucky correctly notes that the state lost several insurers during the 1990s, those insurers accounted for a relevantly small percentage of the population covered in the individual market.³ Even during the disruption of that period, the destabilization of the market was less than Kentucky alleges in its application.

Kentucky also bases its request on the allegation that because of the MLR requirement, two carriers have withdrawn from its individual market and a third has possibly threatened to do so. A review of the actual documents, however, shows that contention is not accurate. One of the two insurers, Mega, simply announced in its 2010 letter that it was no longer writing new business in the state, although it would continue to renew existing business.⁴ Mega did not mention the MLR requirement as the basis for that decision. The other, Physicians Mutual, has not done business in the state since 2005, so its statement that it is not marketing health insurance in Kentucky cannot be attributed to the MLR.⁵

The letter from Assurant, in response to a request from the Insurance Commissioner for its opinion as to an adjustment request, simply says that Assurant would *prefer* an MLR adjustment and in the absence of an adjustment will have to make “tough decisions” and

³ “Status of the Health Insurance Market in Kentucky, 1998,” Research Report No. 290, Legislative Research Commission, January, 2000, p. 6.

⁴ October 12, 2010 letter from Susan Dew of MEGA to Sharon S. Burton, General Counsel of the Kentucky Department of Insurance; Item 21 on CCIIO Document List for the Kentucky MLR Waiver Request.

⁵ October 14, 2010 certification from Shawn Pollock of Physicians Mutual; Item 22 on CCIIO Document List for the Kentucky MLR Waiver Request.

may consider “discontinuing sales of certain products and/or exiting selected markets,”⁶ hardly a threat of immediate withdrawal from Kentucky if an adjustment is not granted. Indeed, the Assurant letter seems to be a response to a letter sent out to carriers generally by the Insurance Commissioner, and one has to wonder how other carriers responded. Apparently, they did not see an urgent need for an MLR adjustment.

It is clear that insurance companies have a vested interest in maintaining a lower MLR with correspondingly higher premiums. If the Kentucky Department of Insurance (KYDOI) had put more effort into surveying consumers, we are confident that a much different result would have been obtained, one that would have supported the higher MLR.

Kentucky’s individual market is very much like the individual markets found in other states, with a dominant insurer and several smaller insurers, some of whose medical loss ratios are at or near the target set by the statute, but some beneath it. A number of Kentucky carriers have fewer than 1,000 members and thus may not owe any rebates under the MLR rules. Others are new entrants that will benefit from the provisions in the rule for allowing new entrants to cumulate experience and to claim contract reserves as incurred claims. There is no showing in the Kentucky request that the Kentucky experience cannot be accommodated within the provisions of the MLR rule itself. Although Kentucky refused to provide information on risk-based capital (RBC)^{7,8}, there is no evidence that the introduction of an 80% MLR would threaten the solvency of existing insurers.

HHS regulations set out information that states must submit and criteria that HHS must apply in determining whether or not to grant a state an adjustment.⁹ The criteria HHS must consider include:

- (a) The number of issuers reasonably likely to exit the State or to cease offering coverage in the State absent an adjustment to the 80 percent MLR and the resulting impact on competition in the State;
- (b) The number of individual market enrollees covered by issuers that are reasonably likely to exit the State absent an adjustment to the 80 percent MLR;

⁶ December 16, 2010 letter from Julia M. Hix of Assurant to Sharon P. Clark, Commissioner of Insurance; Item 23 on CCIIO Document List for the Kentucky MLR Waiver Request.

⁷ The “RBC level” column in the spreadsheet “Financial Information by Issuer – Revised” indicted “PI” (PI=Proprietary Information, the Department is precluded by statute from releasing this information); Item 30 on CCIIO Document List for the Kentucky MLR Waiver Request.

⁸ We are surprised that the KYDOI refused to provide any information regarding RBC levels, since as CCIIO pointed out, the Total Adjusted Capital and the Authorized Control Level Risk Based Capital are available from the issuer’s most recent statutory filing, which is a public document. (March 24, 2011 letter from Timothy B. Hill of CCIIO to Sharon P. Clark, Commissioner of Insurance (Page 2); Item 18 on CCIIO Document List for the Kentucky MLR Waiver Request).

⁹ 42 C.F.R. § 158.321, 158.330.

- (c) Whether absent an adjustment to the 80 percent MLR standard consumers may be unable to access agents and brokers;
- (d) The alternate coverage options within the State available to individual market enrollees in the event an issuer exits the market;
- (e) The impact on premiums charged, and on benefits and cost-sharing provided, to consumers by issuers remaining in the market in the event one or more issuers were to withdraw from the market;
- (f) Any other relevant information.

The Kentucky adjustment request cannot be justified under any of these criteria.

Kentucky has offered no evidence that any insurers will exit the state or cease offering coverage absent an adjustment.

Kentucky offers no evidence that any insurer will leave the market if an MLR adjustment is not granted. No insurer has yet given notice of withdrawal, which is required under Kentucky law.¹⁰ While Assurant did state that it might exit “selected markets” it did not threaten to leave Kentucky specifically. Assurant does business in 41 states, most of which have not requested MLR adjustments. Kentucky notes that two other insurers have stopped writing new business in Kentucky, but the evidence is that those decisions were completely unrelated to the MLR requirement.

Another consideration regarding withdrawal from the health insurance market is that companies must give 180 days’ notice to the commissioner before leaving the insurance market.¹¹ Given this, it is not possible for an insurance company to leave the health insurance market in 2011. Furthermore, if a company withdraws from the market it may not reenter the market for five years. This restriction makes it unlikely that any health insurance company would withdraw from Kentucky in 2012 or 2013.

Indeed, it is unclear why an adjustment is even being requested. According to the CCIIO analysis, the ACA MLR in 2010 for the companies subject to the rebate calculation varies from 71.1% to 78.2%.¹² However, insurers’ MLRs are likely to be higher in 2011 than in 2010 for various reasons as explained by Kentucky’s own Commissioner of Insurance Sharon P. Clark as follows: “For example, the MLR reported for policy year 2010 is the product of the implementation of the rule late in the year for which business models that had not yet been adjusted. Carriers are in the process of adjusting their business models, therefore the current MLR is not a good indicator of true MLR or potential rebates in future years. Other carriers simply explained that regardless of the MLR standard,

¹⁰ The “Provided Notice of Exit” column in the spreadsheet “Financial Information by Issuer – Revised” indicated “No” from all insurers listed; Item 30 on CCIIO Document List for the Kentucky MLR Waiver Request.

¹¹ KRS 304.17A-240.

¹² May 31, 2011 letter from Gary M. Cohen of CCIIO to Sharon P. Clark, Commissioner of Insurance (Page 3); Item 32 on CCIIO Document List for the Kentucky MLR Waiver Request.

through either creditability [sic] adjustments or adjustments to their models, they would not foresee paying refunds under either MLR standard (the federal standard or Kentucky's proposed standards)."¹³ Hence, any possible rebates in 2011 to 2013 are likely to be relatively small, easily accommodated by insurance companies and will neither disrupt nor destabilize the market. There is simply no evidence that insurers will be faced with "crippling rebates"¹⁴ that would drive them from the Kentucky market.

Kentucky has offered no evidence that any enrollees are covered by insurers that will exit the state absent an adjustment.

Because Kentucky has offered no evidence that any insurer will leave the state absent an adjustment, it has also failed to prove that any enrollee will lose coverage because of insurers exiting the state.

Kentucky has not demonstrated that access to agents and brokers will be disrupted if an adjustment is not granted.

The adjustment request expresses a concern that requiring companies to meet the statutory MLR requirement will result in reduced commissions and subsequently in loss of access to producers. Indeed, it states that insurers are already cutting producer compensation. Nevertheless, data recently provided by the National Association of Insurance Underwriters to the NAIC show that in fact none of the eight carriers that reported producer compensation for 2010 and 2011 have cut compensation. Some of the carriers are still paying commissions for first year business at a 10% to 15% level, very high levels compared to other states.

Alternative coverage is available to Kentucky insurance consumers if an insurer exits the state.

If an insurer does withdraw from Kentucky, it is likely that an individual who was covered by that insurer will be able to get coverage through one of the remaining insurers. Individuals who cannot get coverage because of health status issues can get coverage through Kentucky Access. There is no evidence that enrollment in Kentucky Access is closed or capped. Although it is not mentioned in the adjustment application, the Pre-Existing Condition Insurance Plan also operates in Kentucky, and has reduced its rates effective July 1.

The loss to Kentucky consumers of granting this adjustment request would be substantial.

¹³ May 16, 2011 letter from Commissioner Sharon Clark to Timothy B. Hill of CCHIO (Page 3); Item 28 on CCHIO Document List for the Kentucky MLR Waiver Request.

¹⁴ The phrase "crippling rebates" was used Commissioner Sharon Clark in the initial MLR waiver requested to CCHIO dated February 16, 2011 letter (Page 7 of attachment); Item 1 on CCHIO Document List for the Kentucky MLR Waiver Request.

Although the issue is not discussed, the cost of insurance to consumers will necessarily be higher if insurers are allowed to retain high administrative costs rather than move to the 80% MLR. Although insurers have refused to provide information regarding likely rebates, it is likely that consumers will lose rebates they are entitled to if the adjustment request is granted. The absence of rebates to achieve an 80% MLR means that consumers will be paying higher costs for health insurance. If those rebates were available to consumers, those funds could be spent on other goods and services, which would be a benefit to the Kentucky economy and help to create jobs.

The Commissioner has failed to establish that this adjustment request is necessary. Granting it would cause harm to Kentucky consumers. We request that this adjustment proposal be denied.

Sincerely,

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